No. 14-915

IN THE
# Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,
*Petitioners,*

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE UNION RESPONDENTS


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## QUESTIONS PRESENTED

1. Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

## RULE 29.6 STATEMENT

None of the Union Respondents* is a non-governmental corporate party that has a parent corporation or has stock that is held by any publicly held company.

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* The Union Respondents are: California Teachers Association; National Education Association; Savanna District Teachers Association, CTA/NEA; Saddleback Valley Educators Association; Orange Unified Education Association, Inc.; Kern High School Teachers Association; National Education Association-Jurupa; Santa Ana Educators Association, Inc.; Teachers Association of Norwalk-La Mirada Area; Sanger Unified Teachers Association; Associated Chino Teachers; San Luis Obispo County Education Association.

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## INTRODUCTION

For decades, many state and local governments have chosen personnel-management systems under which a majority of employees may elect to be represented by a union, which then acts as the exclusive workplace representative for all employees. To ensure that the exclusive representative has the resources necessary to fulfill its duties in a manner that promotes workforce stability and fairness, many States and local governments authorize the collection of "fair-share fees" from non-union members to cover their proportionate share of the costs associated with collective bargaining, contract administration, grievance processing, and other related matters.

Since *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court has upheld the constitutionality of that basic framework in numerous decisions. The Court also has implemented various procedural requirements to ensure that unions are properly reimbursed for chargeable costs while protecting objecting non-members from having their funds used for purposes not germane to collective bargaining and contract administration. Indeed, just six years ago, a unanimous Court upheld *Abood*'s "general First Amendment principle" to permit public-sector unions to charge non-members for litigation costs associated with contract administration. *Locke v. Karass*, 555 U.S. 207, 213 (2009). This Court has extended *Abood*'s First Amendment principle to the contexts of bar association dues, agricultural marketing subsidies, and other contexts. *Abood* thus represents constitutional authority that is well-settled not only in the public-sector labor field, but also in various dimensions of our constitutional life.

This Court should reject petitioners' request to overrule *Abood*. Their attack rests overwhelmingly on overreading dicta in two recent decisions, *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014). But *Abood* was not at issue in *Knox*, which addressed a union's special assessment for political speech and did not concern the government's interests at all. And *Harris* did not implicate the interests of the State as public employer in managing its workforce because of the State's limited oversight of the employees at issue. The Court's decision not to extend *Abood* to the peripheral context presented in *Harris* does not undermine the continuing validity of *Abood*'s core holding.

Petitioners' arguments largely rehash contentions this Court considered and rejected in *Abood* and numerous subsequent cases. Relitigating previously rejected arguments is not a sound basis for reconsidering precedent. That core principle of *stare decisis* applies with special force when literally tens of thousands of contracts governing millions of public employees have been entered into in reliance on this Court's precedent. Overruling *Abood* would remove from ongoing political debate a policy matter that citizens of different States have chosen to address differently based on local circumstances. Such a radical break from First Amendment and federalism principles is especially unwarranted here, given that petitioners aggressively resisted the creation of any factual record that would justify altering *Abood*'s careful constitutional balance.

Petitioners also ask this Court to overrule decades of precedent upholding opt-out frameworks in which an objector may choose not to support financially a

union's activities unrelated to its exclusive-representation duties. In petitioners' view, the First Amendment requires States to provide for employees to opt *in* rather than objectors to opt *out*. That contention is unpersuasive, however, because central to the First Amendment concern is the employee's *objection*. Without an actual objection, the collection of any fee does not compel funding for any expressive activity.

In numerous cases, this Court has confirmed that the right to opt out sufficiently protects both First Amendment guarantees and other core constitutional rights, and there is no justification for carving out a special exception based solely on petitioners' animus toward statutorily recognized union activities. Nor is there any risk that "inertia" somehow will lead to constitutional infringements: both generally and on the specific allegations here, there is no reason to suppose that checking a box on a one-page form imposes the kind of burden the Constitution was ratified to prevent.

## STATEMENT OF THE CASE

### A. Background Of Agency-Shop Arrangements In The Public And Private Sectors

For much of the Nation's history, workers formed self-help organizations that pressed employers for job-related concessions to ameliorate depressed wages, harsh working conditions, and workdays of more than 12 hours. *See* Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 1-3 (5th ed. 2014) ("Kearney & Mareschal"); Richard B. Morris, *Government and Labor in Early America* 200 (Northeastern ed. 1981). Disruptive conflict between these organizations and employers created significant economic instability, however, and

"abundantly demonstrated" that providing employees a formal mechanism to bargain with employers regarding the terms and conditions of their employment was "an essential condition of industrial peace." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *see* Kearney & Mareschal at 1-6.

To eliminate "industrial strife" caused by "[r]efusal to confer and negotiate," Congress enacted the National Labor Relations Act ("NLRA"), which guarantees private-sector employees' rights to self-organization and collective bargaining. *Jones & Laughlin Steel*, 301 U.S. at 41-42. The NLRA and the Railway Labor Act ("RLA") amendments confirm Congress's determination that agency-shop agreements (1) "'promote[] stability by eliminating "free riders,"'" *NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963) (quoting S. Rep. No. 80-105, pt. 1, at 7 (1947)), and (2) implement the "'firmly established national policy'" of permitting agreements requiring all employees to pay their fair share of collective-bargaining costs, *Communications Workers of Am. v. Beck*, 487 U.S. 735, 750 (1988) (quoting H.R. Rep. No. 81-2811, at 4 (1950)).

The NLRA expressly excludes States and their political subdivisions from its definition of "employer." 29 U.S.C. § 152(2). Thus, consistent with States' traditionally "broad authority under their police powers to regulate the employment relationship," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotations omitted), "States [are] free to regulate their labor relationships with their public employees," *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181 (2007). In a small minority of States, public employers unilaterally impose terms and conditions of employment, allowing

employees no formal role in the process. *See* Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State* 196 (2004). A majority of States have followed the private-sector model embraced in the NLRA and chosen to bargain collectively with their workers. *See id.* Many of those States have further determined, again consistent with Congress's judgments, that fairness and efficiency demand that unions represent every employee – union and non-union – equally in the negotiation and administration of employment terms. Because bargaining, contract administration, grievance resolution, and other related activities require expenditure of considerable resources, and because the law imposes a duty on the union to represent all unit members fairly, many of those States have enacted "agency shop" statutes, which permit collective-bargaining arrangements to require that all workers pay their fair share of the unions' costs that are germane to collective-bargaining activities.

Agency-shop statutes reflect States' sovereign judgment that exclusive representation and fair-share fees are vital "to avoid labor strife, to secure economic stability, to insure the efficiency and continuity of state and local governments, and to develop harmonious relationships between the public employer and its employees." A. L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. L. Rev. 993, 1009-10 (1976). First, by permitting collective-bargaining agreements requiring non-union workers to contribute to collective-bargaining costs, agency-shop statutes promote fairness and reduce discord among employees, resulting in a more productive workforce. Second, such statutes strengthen the bargaining

relationship by eliminating an incentive for unions to "mak[e] excessive demands on the [employer] in negotiations" or to "process[] unwarranted grievances" to "demonstrate that they can 'get something' for their members." Neil W. Chamberlain & Donald E. Cullen, *The Labor Sector* 173 (2d ed. 1971). Finally, agency-shop statutes prevent "financial instability of the duly-elected bargaining agent [that] may jeopardize meaningful collective bargaining." Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 189 (1975).

### B. California's Collective-Bargaining And Contract-Administration Procedures

1. In numerous statutes governing a wide range of public employees, including public-school employees, California has determined that agency-shop arrangements best promote the orderly negotiation of employment terms and conditions and resolution of labor disputes. *See* Educational Employment Relations Act, Cal. Gov't Code §§ 3540-3549.3 (K-12 public schools and community colleges); *see also, e.g.*, Meyer-Milias-Brown Act, Cal. Gov't Code §§ 3500-3511 (municipalities); State Employer-Employee Relations Act, Cal. Gov't Code §§ 3512-3524 (state agencies); Higher Education Employer-Employee Relations Act, Cal. Gov't Code §§ 3560-3599 (state universities and law schools).[1]

California thus has designed a system of collective bargaining for the orderly negotiation of terms and

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[1] Prior California law provided for a members-only meet-and-confer between schools and a "council" composed of competing employee organizations. *See* Darrell Johnson, *Collective Bargaining and the California Public Teacher*, 21 Stan. L. Rev. 340, 357-66 (1969). California abandoned that approach because it proved burdensome and difficult to administer.

conditions of employment. A precondition for collective bargaining is the establishment of a bargaining unit – a specific group of employees – followed by a majority of those employees electing to negotiate collectively with their employer. *See* Cal. Gov't Code § 3544. Upon "proof of majority support," a union "may become the exclusive representative for the employees of [that] unit for purposes of meeting and negotiating." *Id.* § 3544(a), (b). When a union is certified as the exclusive representative for a bargaining unit, the State permits the public-school employer to bargain solely with that union. *See id.* § 3543.1(a).

California law delineates the permissible scope of collective bargaining. Generally, it permits collective bargaining on "matters relating to wages, hours of employment, and other [specified] terms and conditions of employment." *Id.* § 3543.2(a)(1). Certain matters, however, are legislatively determined, and bargaining may not displace those statutorily determined terms. *See id.* § 3540; *see also, e.g., United Teachers of Los Angeles v. Los Angeles Unified Sch. Dist.*, 278 P.3d 1204, 1211-12 (Cal. 2012). For example, health and welfare benefits are subject to bargaining, but pension benefits are not. *See* Cal. Gov't Code § 3543.2. Similarly, the Education Code governs teacher tenure, Cal. Educ. Code § 44929.21, and termination procedures, *id.* § 44932 *et seq.*, which thus fall outside the scope of collective bargaining. *See, e.g., Board of Educ. v. Round Valley Teachers Ass'n*, 914 P.2d 193, 203-04 (Cal. 1996); *San Mateo City Sch. Dist. v. Public Emp't Relations Bd.*, 663 P.2d 523, 533-34 (Cal. 1983).

The formal collective-bargaining process begins with a school district governing board public meeting at which the union and the school district present their initial proposals. *See* Cal. Gov't Code § 3547.

California affords the public – including individual employees – an "opportunity to express itself" before the employer publicly "adopt[s] its initial proposal." *Id.* § 3547(c). Thereafter, the union and the school district negotiate the terms of the collective-bargaining agreement ("CBA") privately. *See id.* § 3549.1(a).

Once the parties reach a tentative agreement, "the major provisions of the agreement" must be "disclosed at a public meeting of the public school employer." *Id.* § 3547.5. As with the initial public meeting, individual teachers and employees are free, like any other citizen, publicly to state their views or opposition to the CBA's terms.

After the final contract is executed, the union has an ongoing duty to administer the CBA. That duty involves providing support and information for employees and facilitating employee-management communications to minimize disputes. If disputes do arise "involving the interpretation, application, or violation of the agreement," the union is responsible for representing employees during informal mediation proceedings and formal arbitration pursuant to the CBA's dispute-resolution procedures. *Id.* § 3548.5; JA178-82, 282-89.[2]

In all these undertakings, California requires the union, as "the exclusive representative for the purpose of meeting and negotiating," to "fairly represent each and every employee in the appropriate unit." Cal. Gov't Code § 3544.9.

**2.** California permits individual employees to decline union membership, Cal. Gov't Code § 3546(a),

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[2] All but one of the CBAs at issue here include such procedures.

but the union must still fairly represent every employee, including non-members, *id.* § 3544.9. Upon notice from the union, employers must deduct from each non-union employee's wages and salary an amount equal to that employee's "fair share" of "the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." *Id.* § 3546(a). These costs are called "chargeable" expenses.

Non-members who object to funding non-chargeable activities need not contribute to such expenses. California's Public Employment Relations Board ("PERB") requires the union to provide non-members a "*Hudson*" notice – so-named for the Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) – containing a "calculation of the [union's] chargeable and nonchargeable expenditures . based on an audited financial report." PERB Regs., 8 C.C.R. § 32992(b)(1) (JA64-65). The notice includes a one-page form (reproduced at JA663-64), entitling a non-member to avoid paying for non-chargeable expenditures simply by placing a checkmark next to the statement that reads "I request a rebate of the nonchargeable portion of my fees," and sending the form back to the union. JA663. Objecting non-members need not explain their reasons for objecting.

Non-members are not bound by the union's calculation of chargeable fees. By checking a second box on the same one-page form, a non-member may initiate a proceeding conducted by an impartial decision-maker in which the union bears the entire financial cost and the burden of proving chargeability. Objectors bear no burden and need not produce evidence,

lodge particular objections, or even be present for the proceeding. JA623.

To reduce conflicts between the union and objectors, respondents routinely provide objecting non-members a reduction in the fair-share fee greater than the non-chargeable portion. JA654-55. In the 2012-2013 fee year, for example, 45.89% of the National Education Association's ("NEA") expenditures were chargeable, but the fee paid by objectors was set at only 40%; for the California Teachers Association ("CTA"), 68.4% was chargeable, but objectors paid 65.4%; for the local unions, the chargeable percentages ranged from 84.36% to 100%, but objectors paid only CTA's 65.4% rate. *Id.*

### C. Procedural History

Petitioners sued in federal district court challenging the constitutionality of California's agency-fee provisions and the opt-out process for obtaining a reduction of the fair-share fee for non-chargeable expenses. JA99-102. Petitioners disclaimed any challenge to California's exclusive-representation provisions. JA74. Petitioners' lawsuit alleged disagreement with "many of the unions' public policy positions, including positions taken in collective bargaining." JA74-79. However, petitioners did not identify any specific "positions" with which they allegedly disagree.

After filing their complaint, petitioners "move[d] for judgment on the pleadings," "but in [respondents'] favor." Pet. App. 6a. Petitioners opposed respondents' efforts to develop an evidentiary record regarding, among other things, the benefits of agency fees and the ease of opting out. JA615-19. Petitioners argued such evidence was unnecessary because their sole objective was to have *Abood* and *Mitchell v. Los*

*Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), which upheld California's opt-out process, "overturned on appeal." Pet. App. 7a & n.3; JA620.

Agreeing that petitioners' claims were foreclosed by *Abood* and *Mitchell*, the district court granted petitioners' motion for judgment against themselves on the pleadings. Pet. App. 7a-8a.

The court of appeals also agreed and affirmed in a summary opinion. *Id.* at 1a-2a.

## SUMMARY OF ARGUMENT

I. *Abood* should be reaffirmed because it correctly respects public employers' prerogative to manage their workforces to ensure the efficient provision of public services to their citizens. Drawing on private-sector employers' experience and Congress's legislative judgments, *Abood* properly recognized that the agency shop serves States' strong interests in the orderly negotiation of terms and conditions of employment and resolution of employee grievances. A single representative is critical to avoid the confusion and burden of negotiating with multiple groups of workers with conflicting demands. When a union serves as exclusive representative, States have a vital interest in ensuring the fair allocation of the costs of that service to all employees.

*Abood* correctly held that the State's interests as employer outweigh any interference with employees' First Amendment rights. *Abood* fully accommodated non-members' First Amendment interests by allowing non-members to opt out of contributing to unions' political expenditures unrelated to collective bargaining. Agency-fee requirements impose no limits on employees' right to speak against the union's positions. Any compelled funding is ancillary to

exclusive representation itself, the constitutionality of which is settled and unchallenged here.

*Abood*'s holding tracks this Court's distinction between speech by employees on workplace matters and speech by citizens on matters of public concern. Collective bargaining is the former. It is a specialized forum set up by the public employer where negotiators bargain in private over certain statutorily defined bread-and-butter employment issues. Collective bargaining does not resemble the wide-ranging, open, and public debate that the First Amendment traditionally protects. Indeed, States can abolish public-sector collective bargaining altogether. *Abood* thus properly reflects the First Amendment's more deferential standard towards government employers in managing their relations with employees.

*Abood* is not an anomaly; its holding and rationale have been repeatedly followed. Just six years ago, the Court unanimously described it as a "general First Amendment principle." *Locke*, 555 U.S. at 213. *Abood* also has supplied the controlling rule in compelled-subsidization cases as diverse as bar dues, student-activity fees, and agricultural marketing. The Court's repeated reliance on *Abood* confirms its soundness as a matter of First Amendment principle.

**II.** Settled *stare decisis* principles also support reaffirming *Abood*. Outlawing fair-share fees will override the judgments of 23 States plus the District of Columbia that have enacted statutory collective-bargaining frameworks covering public-education employees. It also will throw into disarray tens of thousands of collective-bargaining agreements governing millions of teachers, police officers, firefighters, first responders, and other public employees. The *Abood* framework is workable. This Court's

largely unanimous decisions have generated only limited disagreement over its implementation. The only two decisions to break from that pattern – *Knox* and *Harris* – involved contexts that did not directly implicate *Abood* (*Knox*) or did not involve the State's interest in managing its workforce (*Harris*).

Petitioners' suggestion that *stare decisis* does not apply to *Abood* because it "eliminated" constitutional rights mischaracterizes *Abood*, finds no support in this Court's precedents, and would undermine important values of democratic self-governance and federalism. The overly broad constitutional position advocated by petitioners short-circuits vibrant public debate.

Petitioners' criticisms of *Abood*'s analysis rehash arguments *Abood* already rejected, and thus provide no special justifications for ignoring *stare decisis*. Petitioners' claim that *Abood* should have applied "exacting scrutiny" to fair-share fees inappropriately discounts States' prerogatives as employers. At any rate, *Abood* carefully balanced employees' First Amendment rights and the States' vital interests.

*Abood*'s distinction between collective bargaining and political activities correctly reflects the regulated, specialized, workplace-specific nature of collective bargaining. Collective bargaining is a State-created forum in which unions represent employees as employees, not as citizens. Moreover, even if collective bargaining can address issues attracting public discussion, this Court's public-concern test does not focus only on the topic of the speech. Here, the context of the speech – collective bargaining – reinforces its workplace character.

Petitioners misconstrue the labor-peace and free-rider justifications accepted in *Abood* and misappre-

hend those rationales. The States' interests are not limited, as petitioners contend, to ensuring that unions do not go bankrupt. Forcing unions to carry the interests of non-members for free – and giving each employee a financial veto if they disagree with the union on even a single issue – would dramatically undermine unions' effectiveness in serving as a public employer's exclusive bargaining partner.

The facial nature of petitioners' challenge and the absence of any meaningful record also counsel against overruling *Abood*. Petitioners cannot show that fair-share fees are unconstitutional under all circumstances, at the very least because they opposed the development of an evidentiary record.

**III.** This Court's well-settled opt-out framework for implementing *Abood* is properly tailored to the First Amendment's core prohibition on coercion. It is also consistent with other well-established case law requiring individuals to invoke constitutional rights. Petitioners' requested opt-in rule would vastly expand the First Amendment's sweep and lead to unworkable and unnecessary intrusion into large swaths of government activity. If individuals genuinely object to unions' political activities, they can readily fill out and mail in the simple, one-page opt-out form.

## ARGUMENT

### I. *ABOOD* ANNOUNCED A SOUND FIRST AMENDMENT PRINCIPLE ROOTED IN PUBLIC EMPLOYERS' RIGHT TO MANAGE THEIR INTERNAL EMPLOYEE RELATIONS

#### A. *Abood* Correctly Held That States' Interests In Managing Their Workforces Justify The Limited Conditions On Employee First Amendment Interests Imposed By Fair-Share Fees

*Abood* set out a straightforward, common-sense principle: the First Amendment permits States to require public-sector workers who are represented by a union but choose not to become union members to cover their fair share of the union costs associated with "collective bargaining, contract administration, and grievance adjustment," all of which the union conducts on behalf of members and non-members alike. 431 U.S. at 225-26. However, the First Amendment does not permit the State to compel non-members to pay for union expenditures relating to "political and ideological purposes unrelated to collective bargaining." *Id.* at 232. *Abood*'s line reflects a careful balancing of public employees' legitimate First Amendment interests against the State's prerogatives as an employer, taking account of the distinctive and critical role that collective-bargaining activities play in enabling States to maintain stability in their workforces.

*Abood*'s holding flows from the fundamental principle that public employers, no less than private ones, must have the discretion and flexibility to manage their relationships with their employees to achieve labor stability and the efficient provision of public services. Private employers long have enjoyed

the option of instituting agency-shop arrangements, and Congress has affirmed private employers' judgment that fair-share fees promote a stable workforce. *Id.* at 220-22; *see also supra* pp. 4-5. *Abood* properly recognized that the State as employer has an equally strong interest in having a single exclusive-bargaining agent representing all employees, regardless of whether they are members of the union, to avoid the "confusion and conflict" that would arise if "rival teachers' unions each sought to obtain the employer's agreement." 431 U.S. at 224.

When a union serves as exclusive representative, the State has a concomitant interest in ensuring that the costs of the service the union provides to the State are "fairly" allocated among all employees in the bargaining unit, including non-members. *Id.* at 221-22. As *Abood* recognized, the union's tasks "are continuing and difficult ones" and "often entail expenditure of much time and money" to pay "lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Id.* at 221. Because the union is required to expend those resources "equitably to represent all employees . . , union and nonunion," *id.* (internal quotations omitted; alteration in original), exclusive-representation arrangements create a "distinctive" "free-rider" problem: the non-members are "free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). The State thus has a "compelling . interest," *id.* (internal quotations omitted), in "distribut[ing] fairly the cost of these activities among those who benefit,"

*Abood*, 431 U.S. at 221-22; *see also Harris*, 134 S. Ct. at 2636-37

As *Abood* held, the State's prerogative to manage its own internal workplace operations outweighs employees' First Amendment interest in withholding financial support for the union's activities on their behalf. The *Abood* Court arrived at this holding even though it gave significant weight to employees' First Amendment interests. It acknowledged that "compel[ling] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests" in situations where the employee has "ideological objections" to the union's activities. 431 U.S. at 222; *see also id.* at 233-35. Yet it also recognized that any interference with employees' speech interests is mitigated by two important considerations.

First, "[a] public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint." *Id.* at 230; *see also id.* ("[P]ublic employees are free to participate in the full range of political activities open to other citizens."); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 174-75 (1976) (teacher free to speak at meeting "open to the public" "as a concerned citizen"). The agency shop thus does not prohibit employees' freedom to express their views; rather, it "channel[s]" and "redirects" that expression to "a different stage" – namely, the broader public debate in which all employees remain free to participate. *Cf. Rutan v. Republican Party of Illinois*, 497 U.S. 62, 109 (1990) (Scalia, J., dissenting) (noting that because of this feature "the patron-

age system does not have as harsh an effect upon conscience, expression, and association").

Second, any impact on employees' speech interests is ancillary to the exclusive-representation arrangement itself. This Court has upheld the power of the State to elect to make a single union the exclusive representative of the employees within a bargaining group, *see Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 278-79, 282-83, 288 (1984), and petitioners do not challenge that authority here. Given that the union must speak with one voice for members and non-members alike, its positions cannot be subject to the veto of a single dissenting non-member. As *Abood* put it: "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." 431 U.S. at 222-23 (internal quotations omitted).

Based on a careful weighing of these competing interests, *Abood* appropriately concluded that, with respect to fair-share fees for costs germane to contract negotiation and administration and grievance adjustment (but not other unrelated political or ideological expenditures), the importance of the agency shop to the State's managerial objectives justifies any interference with dissenting non-members' First Amendment rights. *Id.* at 222 ("such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations").

### B. *Abood* Is Consistent With This Court's Longstanding Employee-Speech Jurisprudence, Which Recognizes The Government's Discretion As Employer To Structure Personnel Relations

1. *Abood*'s rule is sound and should be upheld because it tracks the distinction between employee speech and citizen speech that forms the backbone for this Court's employee-speech jurisprudence, which developed in parallel to the Court's fair-share fee jurisprudence. *See Abood*, 431 U.S. at 229-31 & n.27 (addressing public-employee speech cases). As this Court has long recognized, "the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008)); *see also Engquist*, 553 U.S. at 598 (noting "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation'") (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961)) (alteration in original).

For the first 150 years of the Republic, "'the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights.'" *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)). Beginning in the 1950s, the Court began to depart from the original First Amendment understanding and held that the government may not "condition" public employment

on the sacrifice of "liberties employees enjoy in their capacities as private citizens." *Id.* at 419; *see Connick*, 461 U.S. at 144 (discussing cases). Even then, however, the Court took care to protect from First Amendment oversight employment conditions that merely regulate speech that a public employer – just like any other employer – legitimately may curtail in managing its workforce.

To implement that core principle, the Court's two-step test in *Pickering v. Board of Education*, 391 U.S. 563 (1968), holds that, if the employee is not speaking "as a citizen" and "on a matter of public concern," "the employee has no First Amendment cause of action." *Garcetti*, 547 U.S. at 418; *see Lane v. Franks*, 134 S. Ct. 2369, 2378-80 (2014) (treating speech "as a citizen" and "on a matter of public concern" as distinct elements). Only as to citizen speech on public matters must the Court "balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011) (quoting *Pickering*, 391 U.S. at 568).

The distinction between speech "as a citizen on matters of public concern" and speech by employees on employment matters is critical to preventing public employees' workplace speech from "interfer[ing] with the efficient and effective operation of government." *Id.* at 2495. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418; *see Connick*, 461 U.S. at 152 (holding

that "wide degree of deference to the employer's judgment is appropriate"). Recognizing a broad First Amendment right for public employees on workplace issues would inappropriately subject government employment decisions to "invasive judicial superintendence," raising "serious federalism and separation-of-powers concerns." *Borough of Duryea*, 131 S. Ct. at 2496-97. Those concerns are especially serious here, where the choice of an agency shop reflects legislative judgments regarding the management of the public workforce and not *ad hoc* decisions by an individual manager responding to particular employee expressive activity.

2. *Abood*'s rule appropriately tracks the distinction between workplace speech and citizen speech. A union representative's speech at the collective-bargaining table or in a grievance hearing room is not speech "as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418. It is well-settled that an *individual* employee's grievance has no First Amendment protection. *See Connick*, 461 U.S. at 154 (First Amendment does not "constitutionalize the employee grievance"). Similarly, collective bargaining, contract administration, grievance adjustment, and the other activities associated with exclusive representation entail speech by employees (or their representatives) regarding the terms and conditions of their employment. *See Borough of Duryea*, 131 S. Ct. at 2496 (recognizing that commonplace "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations," do not present "federal constitutional issue[s]").

The distinctive context and workplace-specific nature of collective bargaining reinforces that conclusion. When a union engages in its role as an

exclusive representative, it "assume[s] an official position in the operational structure of the District's schools." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983). And when unions bargain with public employers as exclusive representative, they do not purport to aggregate or represent all employees' individual viewpoints as citizens about "hotly debated policy issue[s]." Pet. Br. 26. Rather, their bargaining activity has a much narrower and more pragmatic purpose, namely, to present a single, coherent bargaining position for all employees on the "bread-and-butter issues that remain paramount to this day: wages, benefits, working conditions, and job security." Kearney & Mareschal at 6.

Because collective bargaining is part of the government's own internal operations, created by the government, and conducted for the government's own benefit, States have considerable leeway to dictate the way in which it will occur. For example, the State unquestionably can limit the topics on which employees may bargain collectively. *See* Cal. Gov't Code §§ 3540, 3543.2(a)(1) (limiting scope of union representation to "matters relating to wages, hours of employment, and other terms and conditions of employment," but providing that parties' bargaining cannot supersede or conflict with Education Code provisions). States may restrict public access to the negotiations.[3] Indeed, States may refuse to allow collective bargaining altogether, whereas they could not abolish political lobbying.

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[3] *See* Cal. Gov't Code § 54957.6(a) (permitting closed-session discussions regarding collective bargaining); Kearney & Mareschal at 114 (most States exempt collective-bargaining negotiations from "sunshine" laws).

Likewise, this Court's cases establish that public employers have wide leeway to structure the way in which they interact with employees with respect to grievances and other matters affecting the terms and conditions of employment. In *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979) (per curiam), for example, the Court upheld the Arkansas State Highway Commission's policy of refusing to entertain grievances filed by a union rather than directly by the employee. The First Amendment, the Court held, did not impose any obligation on the State "to listen, to respond, or to recognize the [union] and bargain with it." *Id.* at 465. Rather, grievance procedures are a matter of internal personnel administration subject to broad employer discretion, not a matter for constitutional regulation. *See id.* at 464 ("[T]he First Amendment is not a substitute for the national labor relations laws.").

This Court affirmed that same constitutional principle in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), where the State had made the opposite policy choice. Unlike Arkansas, Minnesota's labor-relations system provided that employees in a bargaining unit could "meet and confer" with their employer on certain employment matters *only* through the exclusive union representative. *Id.* at 274-75. The Court rejected discontented employees' First Amendment challenge to that arrangement as well, again emphasizing that the "meet and confer" sessions with the employer were "obviously not a public forum" "open for general public participation." *Id.* at 280; *see also City of Madison*, 429 U.S. at 175 (distinguishing between "true contract negotiations between a public body and its employees" and public meetings of the Board

of Education, which constituted an open forum for "direct citizen involvement").

Employees who object to fair-share fees fundamentally object to the State's internal processes for negotiating employment terms and resolving workplace disputes with employees. Under this Court's well-established employee-speech cases, such objections constitute speech "as an employee." The agency fee applies to workers only in their capacity as employees; it does not impose obligations on citizens generally or limit employees' speech as citizens. *Cf. Lane*, 134 S. Ct. at 2378-79 (employee's court testimony was citizen speech because all citizens have an obligation to give truthful testimony under oath). An employee's objection to the fee likewise does not constitute citizen speech because it is particular to the employee's status as an employee. To the extent the employee seeks to express his views as a citizen, the employee remains free to do so – in public meetings, newspaper editorials, or any other public forum.

The fact that the employee seeks to express disagreement on workplace issues through withholding of funds does not change the employee character of that speech. *Cf. Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (holding that the distinction between compelled speech and compelled silence is "without constitutional significance"). Mandatory fees are less restrictive of free-speech interests because, as here, they leave employees ample opportunities to express their views through other means. The First Amendment interest against compelled subsidization is certainly not *stronger* than the interest in affirmative expression.

The possibility that some topics of collective bargaining may have public-policy consequences also does not make the union's bargaining – or non-members' objections – *citizen* speech. *See Lane*, 134 S. Ct. at 2378 (subject matter of speech is not dispositive); *Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990) (same). Collective bargaining, contract administration, and grievance adjustment remain *employee* speech because they fall within the State's internal personnel administration process for dealing with employment terms and conditions and thus fall squarely within the State's prerogative to manage its workplace.

**3.** Under this Court's public-employee speech cases, *Abood* would have been justified in holding that non-members have no cognizable First Amendment claim as to fair-share fees for chargeable activities. But *Abood* nevertheless applied a form of *Pickering* balancing by weighing individual employee interests and finding fair-share fees "constitutionally justified" by "the important contribution of the union shop to the system of labor relations." 431 U.S. at 222-23; *see also United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001) ("the infringement upon First Amendment associational rights worked by a union shop arrangement [is] 'constitutionally justified'" because it furthers "the legitimate purposes of the group" in order "[t]o attain the desired benefit of collective bargaining").

As this Court has emphasized, "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418. Accordingly, this Court has held

that the second prong of the two-part test requires that "the relevant government entity ha[ve] an adequate justification for treating the employee differently from any other member of the general public." *Id.*; *see also Rutan*, 497 U.S. at 102 (Scalia, J., dissenting) (arguing standard is "Can the governmental advantages of this employment practice reasonably be deemed to outweigh its 'coercive' effects?").

*Abood* concluded that the same rationale Congress found "decisive" in authorizing agency-shop arrangements in the private sector, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 762 (1961), also provided adequate justification for States' adoption of the same practice. *See supra* pp. 4-5 (discussing Congress's judgments in NLRA and RLA). And just as "Congress carefully tailored [the agency-shop] solution to the evils at which it was aimed" by authorizing "the exaction of only those fees and dues necessary to performing the duties of an exclusive representative," *Beck*, 487 U.S. at 749, 762-63 (internal quotations omitted), *Abood* distinguished between fees for "collective bargaining, contract administration, and grievance adjustment" and fees for unrelated political and ideological activities, 431 U.S. at 225-26. *Abood* thus appropriately recognized that Congress's blessing of agency-shop arrangements as important to labor relations in the private sector "constitutionally justified" public-sector employers' use of those same valid arrangements to manage their workforces. *Id.* at 222.

### C. This Court's Repeated Reaffirmance Of *Abood* Demonstrates The Soundness of Its First Amendment Holding

1. This Court has reaffirmed and applied *Abood*'s core holding in six subsequent decisions over a 40-

year period, five of which were unanimous. *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984) (unanimous except for a limited dissent by Justice Powell); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (unanimous); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (unanimously reaffirming *Abood*'s basic holding that employees may be required to pay their share of the expenses of the exclusive representative's collective-bargaining activities); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) (same); *Locke v. Karass*, 555 U.S. 207 (2009) (unanimous).

Indeed, just six years ago, this Court unanimously described *Abood* as establishing a "general First Amendment principle" that the government may "require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee [for collective-bargaining activities] as a condition of their continued employment." *Locke*, 555 U.S. at 213. It then (unanimously) found that the litigation expenses at issue were germane to collective bargaining and thus chargeable consistent with the First Amendment.

This Court also repeatedly has reaffirmed *Abood*'s core rationale that the State's interest in maintaining orderly relations with its employees outweighs non-member employees' diminished First Amendment interest in withholding fair-share fees. *See Ellis*, 466 U.S. at 455-56 (holding that, while the "nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds," the collection of fair-share fees works little "additional inter-

ference with [objecting employees'] First Amendment interests" given the union's role as exclusive representative);[4] *Hudson*, 475 U.S. at 302-03 ("the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights") (footnote omitted).

The Court also consistently has implemented *Abood*'s objective of "'preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). For nearly 30 years since *Hudson*, the Court has held that objective satisfied by allowing objecting employees to opt out of funding political or ideological speech by the union. *See Davenport*, 551 U.S. at 181 (First Amendment does not "mandate[] that a public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*"). It also has developed detailed procedures for notifying potential objectors of the basis for the fees charged and resolving any complaints about the union's characterization of its expenditures. *See Hudson*, 475 U.S. at 302; *infra* pp. 53-56.

**2.** Outside the union-dues context, moreover, this Court repeatedly has recognized *Abood* for the prin-

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[4] Even Justice Powell, who disagreed with the result in *Abood*, agreed that the First Amendment does not bar unions from recouping expenses "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive collective-bargaining representative." *Ellis*, 466 U.S. at 462 (Powell, J., concurring in part and dissenting in part) (internal quotations and brackets omitted).

ciple that, where the government is constitutionally permitted to require membership in a group, it may also require group members to pay dues or other fees to support the group's core activities. Indeed, to our knowledge, *Abood* has framed the analysis of *every* case involving a First Amendment challenge to a law requiring mandatory fees since 1977.

In *Keller*, this Court held unanimously that, just as exclusive representation is justified by the State's interest in stable labor relations, "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." 496 U.S. at 13-14. The Court applied *Abood*'s free-rider rationale to "all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts" even though "members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management." *Id.* at 12. As in *Abood*, given the State's valid justifications for creating the association, the "State Bar may constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 13-14.

The Court also adopted *Abood* as the governing standard in a series of agricultural marketing cases. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472-73 (1997) (reaffirming *Abood*'s holding that "assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group" as long as the funds are "'germane' to the purpose for which compelled association was justified") (internal quotations omitted). In each such case, the Court applied *Abood*'s standard to the particular program at issue.

*See id.* at 473 (generic advertising was "unquestionably germane to the purposes" of the marketing association, and the financial assessments "are not used to fund ideological activities"); *United Foods*, 533 U.S. at 415 (mushroom advertisements did not satisfy *Abood*'s "germane[ness]" test because "the compelled contributions for advertising [were] not part of some broader regulatory scheme"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (describing *Abood* and *Keller* as "controlling").

Finally, in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court again reaffirmed the "constitutional rule" of *Abood* and *Keller* as "limiting the required subsidy to speech germane to the purposes of the union or association." *Id.* at 231; *see id.* at 230-33 (taking *Abood* and *Keller* as the "beginning point" of the analysis but permitting universities broader leeway to mandate fees because of special considerations attendant to student extracurricular activities).

In all, since *Abood* was decided nearly 40 years ago, 17 Justices – including every Member of the current Court and Chief Justice Rehnquist and Justices Brennan, Stewart, White, Marshall, Stevens, O'Connor, and Souter – have authored or joined opinions recognizing *Abood*'s key principle and applying it as the governing rule in cases involving First Amendment challenges to union dues or other mandatory subsidization of speech. As that consensus reflects, *Abood* correctly held that the "vital policy interest[s]" of public employers in fairly allocating the costs of the services provided by the union outweigh the comparatively modest limitations on public employees' expressive freedom. *Lehnert*, 500 U.S. at 519.

## II. *ABOOD* SHOULD NOT BE OVERRULED

### A. *Stare Decisis* Principles Support Reaffirming *Abood*

Because *Abood*'s core principle remains sound, the Court need not reach the issue of *stare decisis*. "[C]orrect judgments have no need for that principle to prop them up." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). But, even if the Court would not adopt *Abood* were it deciding the issue anew, it should reaffirm *Abood* based on *stare decisis*. Strong reliance interests have developed around the agency-shop model. And petitioners' relitigation of arguments originally considered and rejected in *Abood* itself does not supply the "special justification" necessary to displace such a well-entrenched precedent.

"*Stare decisis* . . is 'a foundation stone of the rule of law.'" *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). It "'promotes the evenhanded, predictable, and consistent development of legal principles [and] fosters reliance on judicial decisions.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991)). It also "contributes to the actual and perceived integrity of the judicial process," *Payne*, 501 U.S. at 827, by ensuring that this Court's decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Thus, "[b]efore overturning a long-settled precedent, . . [this Court] require[s] 'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

### 1. *Abood*'s Longevity and Repeated Reaffirmance Compel *Stare Decisis*

Although *stare decisis* is not an "inexorable command," "[o]verruling precedent is never a small matter." *Kimble*, 135 S. Ct. at 2409 (internal quotations omitted). And *Abood* is not just any precedent. *See supra* pp. 26-30. One "cannot find in [petitioners'] claims any demonstration that circumstances have changed so radically as to undermine [*Abood*'s] critical factual assumptions." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality). Indeed, *Abood* correctly anticipated that its core principle – that public employers (no less than private ones) need flexibility in the administration of their workforces – would be an enduring one. *See* 431 U.S. at 225 n.20 ("'The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.'") (quoting *Railway Emps.' Dep't v. Hanson*, 351 U.S. 225, 234 (1956)).

### 2. Overruling *Abood* Would Upend Significant Reliance Interests

The application of *stare decisis* is further supported by the strong reliance interests that *Abood* and its progeny have generated.

*First*, overruling *Abood* would disrupt the laws of no fewer than 23 States that have adopted collective-bargaining systems based on the agency-shop model, including fair-share fees. Those States enacted their collective-bargaining laws against the backdrop of and in reasonable reliance on this Court's longstanding and repeatedly reaffirmed

decisions. Overruling *Abood* would leave all of those laws in disarray. Fair-share agency fees are integral to these State frameworks. They are critical to creating a system that both serves the public employer's interest in a coherent and organized bargaining and grievance process and fairly apportions the costs of providing those services to all employees. *See supra* pp. 5-6. *Stare decisis* counsels strongly in favor of restraint in light of the serious disruption overruling *Abood* and its progeny would have on the laws of nearly half of the States. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature ha[s] acted in reliance on a previous decision [and] overruling the decision would . require an extensive legislative response."); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

*Second*, this Court "ha[s] often recognized" that in "'cases involving . . contract rights' considerations favoring *stare decisis* are 'at their acme.'" *Kimble*, 135 S. Ct. at 2410 (quoting *Payne*, 501 U.S. at 828). Here, overruling *Abood* would call into question thousands of public-sector union contracts governing 9.5 million public employees and affecting scores of critical services, including police, fire, emergency response, hospitals, and, of course, education.[5] Those contracts call for unions to provide vital services to the State. Unions agreed to provide those services based on the contractual expectation of a stable source of funds to pay for the significant costs

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[5] *See* Robert Jesse Willhide, U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 9, tbl. 3 (Dec. 19, 2014) (9.5 million government employees in the 23 agency-fee States and the District of Columbia), http://www.census.gov/content/dam/Census/library/publications/2014/econ/g13-aspep.pdf.

of those services. *See Abood*, 431 U.S. at 221-22. Invalidating agency fees will thus vitiate the basic bargain between the union and the governmental employer. Indeed, if the agency-fee provisions are not severable from the rest of the CBA, the entire CBA may be invalidated. Contrary to petitioners' argument (at 58), the uncertainty created by overruling *Abood* would destabilize otherwise productive labor-management relationships to the detriment of employees, the unions, and the State and its citizens. *See Street*, 367 U.S. at 772 ("The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs in the realm of collective bargaining.") (internal quotations omitted).

### 3. *Abood* Has Proved Workable over Many Decades

This Court's precedents likewise belie petitioners' argument (at 56-58) that *Abood* has become unworkable. *Abood* itself recognized that the line between collective bargaining and ideological activities would be "somewhat hazier" in the public-employee context. 431 U.S. at 236; *see Garcetti*, 547 U.S. at 418 (observing that "conducting these inquiries sometimes has proved difficult" because of "the enormous variety of fact situations" presented) (internal quotations omitted). But it concluded that any line-drawing difficulties were not sufficient reason to abandon sound constitutional principle. *See* 431 U.S. at 235-37. Petitioners' disagreement with that considered judgment does not provide special justification for overruling it, especially given that petitioners' facial challenge arrives divorced from any factual record that would support particular constitutional line-drawing concerns. *See id.* at 236-37 (observing the

"lack of factual concreteness to aid us in approaching the difficult line-drawing questions").

Nor, contrary to *Harris*'s suggestion, has this Court "struggled repeatedly with this issue." 134 S. Ct. at 2633. By *Harris*'s own count, the Court has decided four cases in 32 years applying that line to particular types of expenditures – hardly a torrent that would indicate an unadministrable rule.[6] Those decisions, moreover, have not been divisive. *Ellis* was unanimous except for Justice Powell's limited dissent. *See* 466 U.S. at 457 (Powell, J., concurring in part and dissenting in part). The notice and opt-out procedure established in *Hudson* – which was also unanimous – has become entrenched practice in the nearly 30 years since it was decided. *See* 475 U.S. at 310-11; *id.* at 311 (White, J., concurring). And the most recent case – *Locke* – unanimously held that the litigation expenses at issue were chargeable. *See* 555 U.S. at 221; *id.* at 221-22 (Alito, J., concurring).

The only case that generated significant dissension was *Lehnert*, and even there the disagreement was limited. Justice Scalia's partial concurrence would have adopted a narrower standard for determining when expenditures that are not for collective bargaining itself are sufficiently related to collective bargaining to be chargeable. *Compare Lehnert*, 500 U.S. at 519 *with id.* at 556-57 (Scalia, J.). But any disagreement on that issue has not fostered unworkable disagreements on *Abood*'s scope. *See Locke*, 555

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[6] By comparison, since *Crawford v. Washington*, 541 U.S. 36 (2004), the Court has addressed the scope of *Crawford*'s Confrontation Clause rule eight times in 11 years. *See Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015); *Olson v. Little*, 604 F. App'x 387, 390 n.1 (6th Cir. 2015) (collecting seven additional cases), *petition for cert. pending*, No. 15-6318 (U.S. filed Sept. 24, 2015).

U.S. at 219 ("Applying *Lehnert*'s standard to the national litigation expenses here at issue, we find them chargeable.").[7]

#### 4. There Is No Exception to *Stare Decisis* Applicable Here

Implicitly recognizing that *stare decisis* militates strongly against overruling *Abood*, petitioners contend that *stare decisis* should not apply at all to *Abood* because it "*eliminated*" a constitutional right. Pet. Br. 14 (calling this supposed exception "[d]ispositive[]"). *Abood*, however, did not "eliminate" any constitutional rights. It recognized – but also delineated – employees' First Amendment right not to be compelled to subsidize unions' speech. *See* 431 U.S. at 222-23; *see also supra* pp. 15-18 (noting the original understanding of the First Amendment did not prohibit government from imposing conditions on public employees).

Moreover, this Court has never held that *stare decisis* skews in favor of decisions recognizing rather than "eliminating" constitutional rights. To the contrary, it consistently has held that *stare decisis* demands "special justification" for "*any* departure" from precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (emphasis added). Petitioners' argument is also contrary to the views of at least four Members of this Court in *Arizona v. Gant*, 556 U.S. 332 (2009), who would have relied on *stare decisis* to reaffirm *New York v. Belton*, 453 U.S. 454 (1981), which refused to recognize a Fourth Amendment right not to have the passenger compartment of one's automobile

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[7] Lower-court litigation over *Abood* has steadily declined. Citation of *Abood* in the lower federal courts and state courts peaked in 1983 and has declined since.

searched by the police incident to a lawful custodial arrest. *See* 556 U.S. at 358 (Alito, J., dissenting, joined by Roberts, C.J., and Kennedy & Breyer, JJ.).

Nor would it make sense for *stare decisis* to have force only where decisions recognizing constitutional rights are called into question. *Stare decisis* also serves important democratic values. "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate . . . and then, through the political process, act in concert to try to shape the course of their own times." *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, 134 S. Ct. 1623, 1636 (2014) (Kennedy, J., joined by Roberts, C.J., and Alito, J.); *see New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (internal quotations omitted). The fact that petitioners' First Amendment challenge would override the right of the People through their democratically elected representatives to choose the system of public-sector labor relations that best suits their local circumstances makes adherence to *stare decisis* especially critical here.

In our federal system, States' authority to organize their own internal operations to meet their needs is entitled to broad deference. Pursuant to that authority, citizens have come to different conclusions on whether to recognize agency shops: while 23 States and the District of Columbia permit agency shops, 25 States have enacted "right-to-work" laws that functionally prohibit unions from collecting fair-share fees from non-members. But even some of

those States permit agency-shop arrangements for certain types of employees. *See* Wis. Stat. § 111.85 (public-safety employees); Mich. Comp. Laws § 423.210(4) (police and fire department employees). Citizens in different States continue to debate the wisdom of such arrangements and other labor-relations matters. *See, e.g.*, Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. Times (June 12, 2015). That "fair and honest debate . 'is exactly how our system of government is supposed to work.'" *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (quoting *id.* at 2627 (Scalia, J., dissenting)). The values of federalism and the democratic process counsel against casting aside all of those laws in favor of a sweeping First Amendment right to avoid paying any fair-share fees. *See Board of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 687 (1996) (Scalia, J., dissenting) ("It is profoundly disturbing that the varying political practices across this vast country, from coast to coast, can be transformed overnight by an institution whose conviction of what the Constitution means is so fickle.").

### B. Petitioners' Rehashing Of Legal Arguments Rejected By *Abood* Does Not Justify Overruling It

Much of petitioners' brief is devoted to rearguing *Abood* based on criticisms leveled against it in dicta in *Knox* and *Harris*. But arguments that a "'precedent was wrongly decided'" cannot constitute a "special justification" for overruling prior precedent, *Kimble*, 135 S. Ct. at 2409 (quoting *Erica P. John Fund*, 134 S. Ct. at 2407), especially because most of those arguments were already considered and rejected in *Abood*. *See also Harris*, 134 S. Ct. at 2632 (noting that at least some of its criticisms "were noted

or apparent at or before the time of the decision"). "The [*Abood*] majority did not find th[ose] argument[s] persuasive then, and [petitioners] ha[ve] given [the Court] no new reason to endorse [them] now." *Erica P. John Fund*, 134 S. Ct. at 2409. In any event, petitioners' long-after-the-fact criticisms of *Abood* lack merit.

### 1. *Abood* Gave Appropriate Weight to Public Employees' First Amendment Interests

Petitioners' argument that *Abood* should have held fair-share fees to "exacting" First Amendment scrutiny mischaracterizes this Court's precedents. This Court has "consistently applied a lower level of scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] international operatio[ns].'" *Rutan*, 497 U.S. at 98 (Scalia, J., dissenting) (quoting *Cafeteria & Rest. Workers*, 367 U.S. at 896) (alterations in original); *see also Enquist*, 553 U.S. at 598; *Umbehr*, 518 U.S. at 675-76.

Petitioners ignore those cases and instead rely almost entirely on this Court's political-patronage decisions. It is doubtful that those cases applied "exacting" scrutiny. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996) ("the inquiry is whether the affiliation requirement is a reasonable one"). To the extent *Rutan* may have, its correctness has been rightly questioned. *See Rutan*, 497 U.S. at 100, 115 (Scalia, J., dissenting) (noting that prior patronage cases invoked *Pickering* balancing, not strict scrutiny, which "finds no support in our cases"); *United States Civil Serv. Comm'n v.*

*National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564-65 (1973) (applying *Pickering* balancing to uphold the constitutionality of the Hatch Act's restriction on political speech by public employees); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding the Hatch Act). Indeed, accepting petitioners' argument would call into question this Court's longstanding decisions upholding the Hatch Act and other restrictions on speech in the workplace.

There is no justification for extending "exacting scrutiny" to this context. This Court's patronage cases explicitly rejected the premise that patronage practices relate to and can be justified by the State's legitimate interests in achieving operational efficiencies. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 365-67 (1976) (plurality). By contrast, Congress and nearly half the States reasonably have determined that agency-shop statutes promote employers' interests in efficient operation by fostering stable labor relations. Moreover, unlike agency fees, patronage policies clearly affect *citizen* speech, not just employee speech. Party affiliation is not limited to the employee's conduct in the workplace; it pervades all aspects of life as a *citizen*. Being forced upon pain of losing one's livelihood to change party affiliation thus exceeds the government's right "as proprietor" to regulate the workplace. *Engquist*, 553 U.S. at 598 (internal quotations omitted). The same cannot be said of the agency shop, which leaves employees "free to participate in the full range of political activities open to other citizens." *Abood*, 431 U.S. at 230.

The comment in *Knox*, repeated in *Harris*, that the agricultural-subsidy cases subjected the mandatory advertisement assessments to "exacting" scrutiny did not sweep away these well-established principles.

*See Knox*, 132 S. Ct. at 2289 (citing *United Foods*); *see also Harris*, 134 S. Ct. at 2639 (citing *Knox*). *United Foods* did not involve the government's regulation of its own workforce in its capacity as "proprietor."[8] *United Foods* therefore applied a standard for "'regulatory'" fees. *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414).

Likewise, *Knox* and *Harris* did not implicate the government's interests as proprietor. *Knox* concerned the union's procedural obligations to employees to enforce *Abood*'s line between chargeable and non-chargeable activities. *See id.* at 2291 (addressing "a special assessment billed for use in electoral campaigns" that was collected without providing a new opportunity for non-members to opt out). The union's special assessment was for non-chargeable political expenditures and did not implicate the State's interests in any way. The State was not a party and did not defend the assessment, even as *amicus*. *Harris* involved a personal-assistant program in which the "employer-employee relationship [was] between the person receiving the care and the person providing it" and "the State's role [wa]s

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[8] Fair-share fees bear little resemblance to the compelled speech in cases such as *United Foods*. Unlike agricultural marketing, fair-share fees primarily fund unions' legally mandated *activities* of obtaining, administering, and enforcing agreements on employment terms and conditions. That these activities sometimes involve speech on many matters related to personnel management "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Requiring employees to compensate unions for the services they perform as exclusive representative "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *Id.*

comparatively small." 134 S. Ct. at 2624. On those facts, the Court held that Illinois "[was] not acting in a traditional employer role" or "as a 'proprietor in managing its internal operations.'" *Id.* at 2642 & n.27 (quoting *Nelson*, 562 U.S. at 138, 150).

Petitioners' argument for "exacting scrutiny" simply cannot be squared with the Court's repeated holdings that employee-speech restrictions are subject to "*deferential* weighing of the government's legitimate interests" against its employees' "First Amendment rights." *Umbehr*, 518 U.S. at 677-78 (emphasis added); *see generally Rutan*, 497 U.S. at 97-102 (Scalia, J., dissenting).[9]

### 2. *Abood*'s Distinction Between Collective Bargaining and Political Lobbying Is Sound

As for petitioners' challenge (at 20-29) to *Abood*'s distinction between "collective bargaining" and "ideological" activities, the Court "need not settle this dispute," *Erica P. John Fund*, 134 S. Ct. at 2409, because it was raised and resolved in *Abood* itself.

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[9] At any rate, even if "exacting scrutiny" accurately described the First Amendment standard when the State acts as employer, it would not warrant overruling *Abood*. Although *Abood* did not use the language of tiers of scrutiny – which, at the time, was tied to equal-protection concepts – it recognized the significance of the First Amendment interests at stake and arguably applied a *more* stringent standard than required under this Court's two-step *Pickering* analysis. *See supra* pp. 15-18. Moreover, *Abood*'s careful line between speech germane to collective bargaining and political speech unrelated to those activities is narrowly tailored to that vital government interest because without mandatory fees non-members would free-ride on the union's collective-bargaining efforts. *See Lehnert*, 500 U.S. at 556 (Scalia, J.) (*Abood* found the "distinctive" "free-rider" problem a "'*compelling state interest*' that justifies this constitutional rule") (emphasis added).

*See* 431 U.S. at 226-29 (rejecting argument that "collective bargaining in the public sector is inherently 'political'"). Petitioners have offered no new (much less "special") justifications, just "'wrong on the merits'-type arguments" to which *stare decisis* "does not ordinarily bend." *Kimble*, 135 S. Ct. at 2413.

In all events, petitioners' argument ignores the key differences between collective bargaining and political lobbying. *See supra* pp. 21-22. Even to the extent collective bargaining may touch on some topics that could also be the subject of lobbying, the subject matter of speech is not the only determinant of whether it is "political speech." *See Connick*, 461 U.S. at 147-48 (inquiry focuses on "the *content, form, and context* of a given statement, as revealed by the whole record") (emphasis added). That is why a public-school student may, as a citizen, lobby for legalization of marijuana, but a school may nonetheless prohibit that student from displaying a "BONG HITS 4 JESUS" sign at a school event. *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-74 (1991) (noting restrictions on attorneys that do not apply to ordinary citizens); *Brown v. Glines*, 444 U.S. 348, 354-58 (1980) (soldier acting as a citizen may circulate petitions off base, but may not do so on base). Likewise, the government may regulate statements made by employees in the workplace that it could not regulate if those same statements were made by those same employees in the public square. *See, e.g., Garcetti*, 547 U.S. at 423.

Petitioners repeatedly argue (at 30, 49) that all nine current Justices agree that fees supporting expression on *any* matter that attracts political debate cannot be collected. But that assertion distorts

Justice Kagan's *Harris* dissent by deleting the italicized language in the following sentence: "[S]peech in political campaigns relates to matters of public concern *and has no bearing on the government's interest in structuring its workforce*; thus, compelled fees for those activities are forbidden." 134 S. Ct. at 2654. Justice Kagan's actual statement accurately describes the law: even speech that arguably touches on "political" topics is not speech "as a citizen on a matter of public concern," *Garcetti*, 547 U.S. at 418, if it is employee speech that implicates the government's prerogatives as employer.

For similar reasons, the argument that collective bargaining may have a fiscal impact – and thus attract public attention – does not justify the conclusion that speech is citizen speech as opposed to employee speech.[10] Otherwise, virtually all government personnel decisions would be matters of public concern. After all, when thousands of employees are aggregated, even small wage or benefit issues can affect the public fisc. Deciding how much fiscal impact is enough would create unworkable line-drawing problems necessitating costly and burdensome litigation for public employers. *See Harris*, 134 S. Ct. at 2642 & n.28 (agreeing that issues with "negligible" fiscal effects are not of public concern). Petitioners' rule is also easily manipulable: a single employee could readily claim that his grievance is shared by other workers and thus raises matters of public concern.

Petitioners also contend (at 28-29) that *Abood* erred in drawing support for its holding from *Hanson* and *Street* because those cases involved private

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[10] Justice Powell also made that argument, *see Abood*, 431 U.S. at 258, and the Court rejected it, *see id.* at 227-32.

employers. That complaint also is of old vintage: Justice Powell's *Abood* concurrence raised it, *see* 431 U.S. at 250, but the *Abood* Court found it not "persuasive," *id.* at 226. Subsequent cases likewise rejected that contention. *See Locke*, 555 U.S. at 213 ("[i]n *Hanson*, *Street*, and *Abood*, the Court set forth a general First Amendment principle"); *Lehnert*, 500 U.S. at 555 (Scalia, J.) ("[T]here is good reason to treat [*Street*] as merely reflecting the constitutional rule suggested in *Hanson* and later confirmed in *Abood*."). Those cases correctly decided that public employers have just as strong an interest as private employers in obtaining the benefits of union-shop arrangements. Indeed, *Abood* held, the broad latitude accorded public employers' judgments about how to organize and structure their internal operations should certainly allow them to adopt the kinds of well-established and well-understood management arrangements that have been successfully and lawfully used in the surrounding private-sector context.

### 3. Petitioners' Criticisms of *Abood*'s Description of the Government's Interests Are Unpersuasive

Petitioners' criticisms (at 29-44) of the government interests recognized in *Abood* – labor peace and avoiding free-riding – are also efforts to relitigate *Abood* itself and cannot justify departure from *stare decisis*. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). In any event, petitioners' arguments are unpersuasive.

**a.** As to labor peace, petitioners argue (at 30-33) that the State does not need to require fair-share fees because unions will not go bankrupt without them. But absolute necessity is not the standard; public employers must have latitude to prevent harm

to their operational interests before they occur. *See Waters v. Churchill*, 511 U.S. 661, 673-74 (1994) (plurality); *supra* pp. 19-25.

Here, the State's interest in "labor peace" extends beyond ensuring the mere existence of a recognized bargaining partner. *Abood* recognized the State's interest in an effective bargaining partner based on the multi-decade experiences of private-sector employers, as well as Congress's recognition that fair-share fees facilitate the effectiveness of unions in maintaining stable labor relations. *See Street*, 367 U.S. at 772 ("The complete shutoff of [fair-share fees as a] source of income threatens the basic congressional policy of self-adjustments between effective carrier organizations and *effective* labor organizations.") (emphasis added); *Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting) ("Private employers, *Abood* noted, often established [fair-share provisions] to ensure adequate funding of an exclusive bargaining agent, and thus to promote labor stability."). Petitioners' speculation – unsupported by any evidentiary record – about what would happen in a world without fair-share fees is insufficient to overturn *Abood*'s contrary experiential judgments. *See Waters*, 511 U.S. at 673-74 (plurality) (Court has "given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern").

Indeed, substantial real-world evidence contradicts petitioners' rosy predictions. Empirical research demonstrates that unions forced to carry large numbers of free riders are "less financially stable," with "lower liquidity, lower reserves, and heavy borrowing," which "suggest[s] that staying afloat is a continuing challenge." Marick F. Masters & Robert

S. Atkin, *Financial and Bargaining Implications of Free Riding in the Federal Sector*, 22 J. Collective Negotiations 327, 339 (1993) (concluding, based on a decade of data from federal-sector labor organizations, that unions with lower levels of free riding possess an "evidently much greater capacit[y] to serve bargaining units").

Equally unavailing is petitioners' claim (at 31-32) that unions will not risk bankruptcy because they have "massive amounts" to redirect to collective-bargaining costs from political advocacy. That claim rests on petitioners' erroneous attribution of political advocacy by four separate entities (including two non-union entities) to the single union. JA641 (Amended Answer).[11] Moreover, unions have obligations to their members, who paid union dues to support those activities; they cannot simply redirect those funds to activities benefiting non-members. *Cf. NLRB v. International Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 593 (1987) ("[I]t is simply unfair to require unions to accept members who receive all of the benefits of the association and bear none of the obligations.").

**b.** Petitioners' criticism (at 33-44) of *Abood*'s free-rider rationale fares no better. That rationale is not "oxymoronic." Pet. Br. 34. Petitioners' argument focuses on issues – such as teacher tenure, budget layoff standards, and the standards for teacher termination – that may divide public-school teachers. But those are red herrings. As an initial matter, California does not generally permit collective bargaining over those issues, which are governed by

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[11] Given that petitioners successfully moved for judgment on the pleadings in respondents' favor, the Amended Answer must be taken as true. *See* Br. in Opp. 25 n.16.

state statute. *See, e.g.*, Cal. Educ. Code § 44929.21 (addressing teacher tenure); *id.* §§ 44932 *et seq.*, 44948 *et seq.* (addressing teacher termination); *id.* § 44955 *et seq.* (addressing force reductions); *see also* Cal. Gov't Code § 3540 ("[t]his [collective-bargaining] chapter shall not supersede other provisions of the Education Code").[12] Putting that aside, petitioners exaggerate the divisions created by these issues. Even "teachers who believe they are above-average" (Pet. Br. 35), routinely benefit from seniority protections and due-process protections – for example, where more experienced teachers are targeted for termination in a budget layoff because of their higher salaries.

More fundamentally, the vast majority of issues on which the unions bargain are of common interest to *all* union and non-union employees alike. *E.g.*, JA113 (agreement regarding health and dental insurance), 117-18 (alternative work schedules), 119-20 (length of work day), 134-36 (sick leave). These are uncontroversial workplace matters and simply require little more than coordination between the public employer and its employees. But they must be decided for the State to go about its business.

Petitioners argue (at 36-37) that the free-rider justification is *weaker* in the collective-bargaining context because employees are "compelled" to "free ride" on the unions. But that argument simply takes issue with this Court's prior conclusion, best expressed by Justice Scalia's *Lehnert* opinion, that the requirement of unions to "carry" non-members is the "distinctive" feature of the free-rider issue that

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[12] Other States similarly restrict collective bargaining on such issues. *See, e.g.*, Del. Code tit. 19, § 1311A(a)(1); Haw. Rev. Stat. § 89-9(d).

"*justifies*" the fair-share fee. *See Lehnert*, 500 U.S. at 556 (Scalia, J.) (emphasis added); *id.* (*Abood* found the "distinctive" "free-rider" problem a "'*compelling state interest*' that justifies this constitutional rule") (emphasis added); *accord Locke*, 555 U.S. at 213.

c. Petitioners level three other criticisms at Justice Scalia's articulation of the constitutional basis of a fair-share system in *Lehnert*, but those criticisms are unpersuasive.

*First*, petitioners argue (at 38-41) that unions voluntarily *assume* the fair-representation duty by electing to represent non-members rather than being a members-only union. These arguments again miss *Abood*'s fundamental point, which related to the *State*'s interests, not the union's. *See Ellis*, 466 U.S. at 456 ("The very nature of the free-rider problem and the *governmental* interest in overcoming it require that the union have a certain flexibility in its use of compelled funds.") (emphasis added). Because the State has an interest in an effective representative for its employees, it has a strong interest in ensuring that unions that shoulder this responsibility be able "fairly" to recoup the "expenditure of much time and money" that goes into acting as an exclusive representative. *See supra* pp. 16-17.

*Second*, petitioners also incorrectly argue (at 41-43) that the duty of fair representation imposes no "meaningful" obligations on the union that they would not otherwise undertake in the collective-bargaining process. Absent the duty, unions would have every reason to favor their own members, rather than let non-members free ride. It is also not correct that "[t]he nondiscrimination duty does not require unions to consider, much less advocate, non-members' preferences." Pet. Br. 41. To the contrary,

unions are required affirmatively "to consider requests of non-union members and expressions of their views." *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 204 (1944). That is not a responsibility unions would voluntarily go out of their way to assume.[13]

*Third*, contrary to petitioners' claims (at 43-44), relying on the union's statutory duties in reaffirming *Abood* would not require overruling *Lehnert*. As explained above, *every* Justice in *Lehnert* agreed that *Abood* was justified by the State's interest in avoiding the "distinctive" free-rider problem created by the statutory duty of fair representation. The Court divided only as to whether the particular expenses had to be incurred as part of the duty of fair representation, 500 U.S. at 557-58 (Scalia, J.), or could be simply "germane" to the collective-bargaining process, *id.* at 527 (majority). This case does not challenge *Lehnert*'s germaneness test, or the chargeability of any specific expenses, and thus does not warrant revisiting that debate. *See Locke*, 555 U.S. at 215-16, 219 (reaffirming *Lehnert* unanimously).

Similarly, there is no occasion here to decide whether fees paid to the respondent national organizations satisfy either the *Lehnert* majority's "germane[ness]" test or Justice Scalia's fair-representation standard. *See* Pet. Br. 44. Both opinions made clear that many national activities

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[13] Contrary to petitioners' suggestion (at 42-43), the duty of fair representation does not undermine the State's interest in agency fees. A State legitimately may demand that a union – or any contractor – serve various groups non-discriminatorily, but that does not mean the State lacks an interest in ensuring that the costs of those services be allocated fairly among all employees to whom the union owes the duty. *See Lehnert*, 500 U.S. at 557 (Scalia, J.).

would qualify as chargeable. *See* 500 U.S. at 524 ("[w]e conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates"); *id.* at 561 (Scalia, J.) (approving "pro rata assessment of NEA's costs in providing collective-bargaining services," as well as "on-call services"). Because petitioners actively resisted compiling a record, *see supra* pp. 10-11, they have nothing to say about these charges. In fact, national organizations do fulfill aspects of the duty of fair representation placed upon their local affiliates.

**d.** Finally, contrary to petitioners' argument (at 44-47), the exclusive bargaining representative's fair-representation duty as to grievance proceedings is an important justification for the fair-share fee. As *Abood* correctly recognized, handling of grievances, collective bargaining, and contract administration are all part of a holistic undertaking by the union to negotiate, administer, and enforce terms and conditions of employment. *See* 431 U.S. at 221; *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) ("The grievance procedure is . a part of the continuous collective bargaining process."). And, "in carrying out these duties, the union is obliged fairly and equitably to represent all employees , union and nonunion." *Abood*, 431 U.S. at 221 (internal quotations omitted; alteration in original); *see also id.* at 263 n.16 (Powell, J., concurring in the judgment) ("The processing of individual grievances may be an important union service for which a fee could be exacted with minimal intrusion on First Amendment interests."); *Harris*, 134 S. Ct. at 2637 ("[The union] has the duty to

provide equal and effective representation for non-members in grievance proceedings, an undertaking that can be very involved.") (citation omitted). Petitioners claim (at 46-47) that grievances are merely designed to enforce the CBA, with which objecting non-members disagree. But it is implausible that non-members object to the *entire* CBA. The union represents non-members on many uncontroversial issues that indisputably benefit them, such as the enforcement of sick-leave policies. JA134-36, 178-82. Yet, under petitioners' theory, the union would still be under a duty to represent non-members in grievances even though they refuse to pay for fees related to grievances.[14]

### C. Overruling *Abood* Is Especially Unwarranted Given The Facial Nature Of Petitioners' Challenge And Their Refusal To Develop Any Evidentiary Record

Petitioners ask this Court to overrule *Abood* and its progeny and hold that *any* fair-share fees collected without affirmative consent by *any* union in *any* State for *any* purpose are unconstitutional. Petitioners' challenge exemplifies the kind of facial challenge "disfavored" by this Court. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). As even Justice Powell recognized in his *Abood* opinion, there are certainly *some* collective-bargaining topics as to which any individual's First Amendment interests are "comparatively weak" and

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[14] Petitioners argue (at 45-46) that requiring unions to handle the grievances of non-members "actually benefits the unions" because the union will "elevat[e] [its] interests over those of dissenters." But that suggestion is baseless speculation with utterly no support in the record or elsewhere, and is already addressed by the duty of fair representation itself.

the State's interests "strong." 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment); *see id.* (opining that, even under a case-specific balancing analysis, issues such as "teachers' salaries and pension benefits" would not create First Amendment difficulties).

Here, moreover, petitioners raise their sweeping challenge without having developed *any* evidentiary record – indeed, strenuously and successfully opposing respondents' efforts to do so – and without having specified the issues on which they purportedly disagree with the union. This Court should be particularly unwilling to overrule *Abood* given the "fact-poor record[]" before it. *Sabri v. United States*, 541 U.S. 600, 609 (2004). Instead, the Court should "proceed with caution and restraint," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), and reject petitioners' blanket challenge to all fair-share fees.

## III. REQUIRING OBJECTING EMPLOYEES TO OPT OUT OF FAIR-SHARE FEES FOR NON-CHARGEABLE ACTIVITIES IS CONSISTENT WITH *ABOOD*'S FRAMEWORK AND WELL-SETTLED FIRST AMENDMENT PRINCIPLES

### A. The Court Should Decline To Modify *Abood*'s Well-Established And Sound Opt-Out Framework

In the decades since *Abood*, this Court has developed a workable and widely accepted framework for implementing its core holding that employees who object to the union's political and ideological activities may not be "compelled" to support them. *Abood*, 431 U.S. at 236-37. Central to that framework is *Hudson*'s holding, tracing back to *Abood* itself, that objecting employees retain "the burden of raising an

objection" to funding such activities, but have the right to (1) notice explaining the basis of the fair-share fee and (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. at 306, 310; *see also id.* at 306 ("In *Abood*, we reiterated that the nonunion employee has the burden of raising an objection."). For the same reasons the Court should decline to overrule *Abood*, it also should decline to modify the longstanding opt-out framework this Court developed to implement *Abood*'s core holding. *Cf. Erica P. John Fund*, 134 S. Ct. at 2407 (declining to overrule *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), or prerequisites for invoking presumption of reliance).

California's opt-out framework is appropriately tailored to the substantive right recognized in *Abood*: namely, the right not to be *compelled* to subsidize ideological speech to which the employee objects. *Abood*, 431 U.S. at 236-37. Indeed, numerous cases before and after *Abood* indicate that an employee's right to object avoids any compulsion of expressive activity. *See Lehnert*, 500 U.S. at 516 (government may not "force employees to contribute"); *Keller*, 496 U.S. at 9-10 ("compelled . contributions") (internal quotations omitted); *Beck*, 487 U.S. at 745 (RLA prohibits political expenditures "over the objections of nonmembers"); *Ellis*, 466 U.S. at 438 (RLA "does not authorize a union to spend an objecting employee's money to support political causes"); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 118-19 (1963) (impermissible to spend funds "'over an employee's objection'") (quoting *Street*, 367 U.S. at 768-69). Indeed, as a unanimous Court observed in *Davenport*, "[n]either *Hudson* nor any of our other cases has held that the First Amendment mandates that a

public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*." 551 U.S. at 181.

Petitioners erroneously assert (at 62-63) that those principles resulted from this Court's failure to conduct rigorous analysis. Rather, *Abood*'s framework reflects this Court's repeated holdings that a right to opt out avoids compulsion prohibited by the First Amendment. *See Christian Legal Soc'y Chapter v. Martinez*, 561 U.S. 661, 682 (2010) ("regulations that *compelled* a group to include unwanted members, *with no choice to opt out*," have been held unconstitutional, whereas less strict requirements have not) (second emphasis added); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("In the present case attendance [at a flag salute] is not optional."); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004) ("Consistent with our case law, the School District permits students who object [to reciting the Pledge of Allegiance with the words 'under God'] to abstain from the recitation.") (citing *Barnette*); *id.* at 31 n.4 (Rehnquist, C.J., concurring in the judgment) (In *Barnette*, "[t]here was no opportunity to opt out, as there is in the present case. . Compulsion, after *Barnette*, is not permissible, and it is not an issue in this case.").

Moreover, this Court has held that the right to opt out adequately protects other constitutional guarantees, such as due process, the right to criminal counsel, and the right against self-incrimination. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of

the class if they do not 'opt out.'"); *Davis v. United States*, 512 U.S. 452, 459 (1994) (suspects must unambiguously assert right to counsel); *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (suspects must affirmatively and unambiguously assert constitutional right to remain silent).

Indeed, the failure to object routinely results in forfeiture of constitutional rights. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009) ("[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence"); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982) ("failure to enter a timely objection to personal jurisdiction constitutes . a waiver of the objection"). Petitioners' argument is contrary to the longstanding tradition that individuals must invoke their constitutional rights; the government does not do so for them.

### B. Petitioners' Unfounded Concerns About Public Employees' "Ignorance And Inertia" Do Not Justify An Opt-In Requirement

Petitioners contend (at 60, 62) that requiring employees to object to fair-share fees creates an unconstitutional "risk" of "inadvertent[]" loss of First Amendment rights. Notably, because they opposed the development of the record and thus have no evidence of real-world risk, they make the blanket assertion that an opt-out requirement is always unconstitutional however easy it may be for objectors to avoid the fees. *See supra* pp. 10-11. That position would alter fundamentally the substance of the First Amendment right, from a right against *compelled* subsidization to a right against *mistaken* subsidization. *Cf. Waters*, 511 U.S. at 692 (Scalia, J., concurring in the judgment). There is no precedent for that

dramatic expansion of the First Amendment. *See Rutan*, 497 U.S. at 110 (Scalia, J., dissenting) (First Amendment prohibits *coercion* but not other government action that might "influence[] individual political expression and political association").

Moreover, the overbreadth of petitioners' rule would impose intolerable societal costs. *Cf. Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting) ("The value of any prophylactic rule . must be assessed not only on the basis of what is gained, but also on the basis of what is lost."). Under petitioners' view, for example, public schools would have to require affirmative opt-in by all students to avoid risking the infringement of religious objectors' free-exercise rights. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). Similarly, schools could not lead the Pledge of Allegiance, without obtaining *every* child's affirmative consent, because of the "risk" (however slight) that some children would feel pressured to participate. *See West Virginia State Bd. of Educ. v. Barnette*, *supra*. The government's operations would grind to a halt if affirmative consent had to be obtained each time government programs created the possibility of First Amendment objection.

*Knox*'s statement that "[c]ourts 'do not presume acquiescence in the loss of fundamental rights'" did not embrace such a sweeping change. 132 S. Ct. at 2290 (quoting *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). That statement – drawn from a different context altogether (state sovereign immunity) – merely says that the voluntary and intentional relinquishment of recognized constitutional rights should not be lightly inferred from ambiguous conduct. *See College Sav. Bank*, 527 U.S. at 682. But because the

substantive First Amendment protection is against compulsion, an opt-out rule does not *presume* the loss of any rights. Rather, it is "carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 303.

Petitioners raise (at 61-62) the specter of a system in which the State requires individuals to pay for political speech with a specific viewpoint – such as donations to a political party – and preys on "inertia" or "ignorance" to thwart their right to object. The complete absence of any record evidence of inertia or ignorance refutes petitioners' assertion. All employees must do is "check a box on a form" each year to opt out. *Id.* No petitioner failed to do so, *see* JA74-79, and no petitioner alleges having been deterred by the need to fill out and mail the simple one-page opt-out form. *See* JA663-64 (reproduction of form); JA659-60. Petitioners' concerns about "inertia" and "ignorance" are also implausible. If the union's position on a particular issue offends non-members' conscience, it is hard to fathom that the need to check a box and mail in a form would deter them from vindicating their objection.[15]

Petitioners suggest that an opt-in rule is warranted because the "default rule [does not] comport with the probable preferences of most nonmembers." *Knox*, 132 S. Ct. at 2290. But they cite no evidence to support that assertion. Moreover, even if it were

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[15] Petitioners assert that teachers who "miss[] the deadline" must pay the full fee, Pet. Br. 7, but proffer no allegation or evidence to support that allegation. The record is devoid of evidence, for example, that the deadline has ever been enforced or that it would not be waived for some excusable reason. Moreover, a reasonable deadline is not an unconstitutional burden but an administrative necessity. No case of this Court has treated it otherwise.

true, they cite no precedent finding a constitutional violation based on such "probable preferences." "[A]rgument[s] rest[ing] on nothing more than unsupported speculation," *Gomez-Perez v. Potter*, 553 U.S. 474, 490 (2008), cannot justify overturning decades of precedent and facially invalidating California's opt-out procedure. *See Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) (explaining that "mere possibility is plainly insufficient to invalidate [a] statute on its face"; courts should "not invalidate[] [a] statute on a facial challenge based upon a worse-case analysis that may never occur").

## CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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